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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 274.

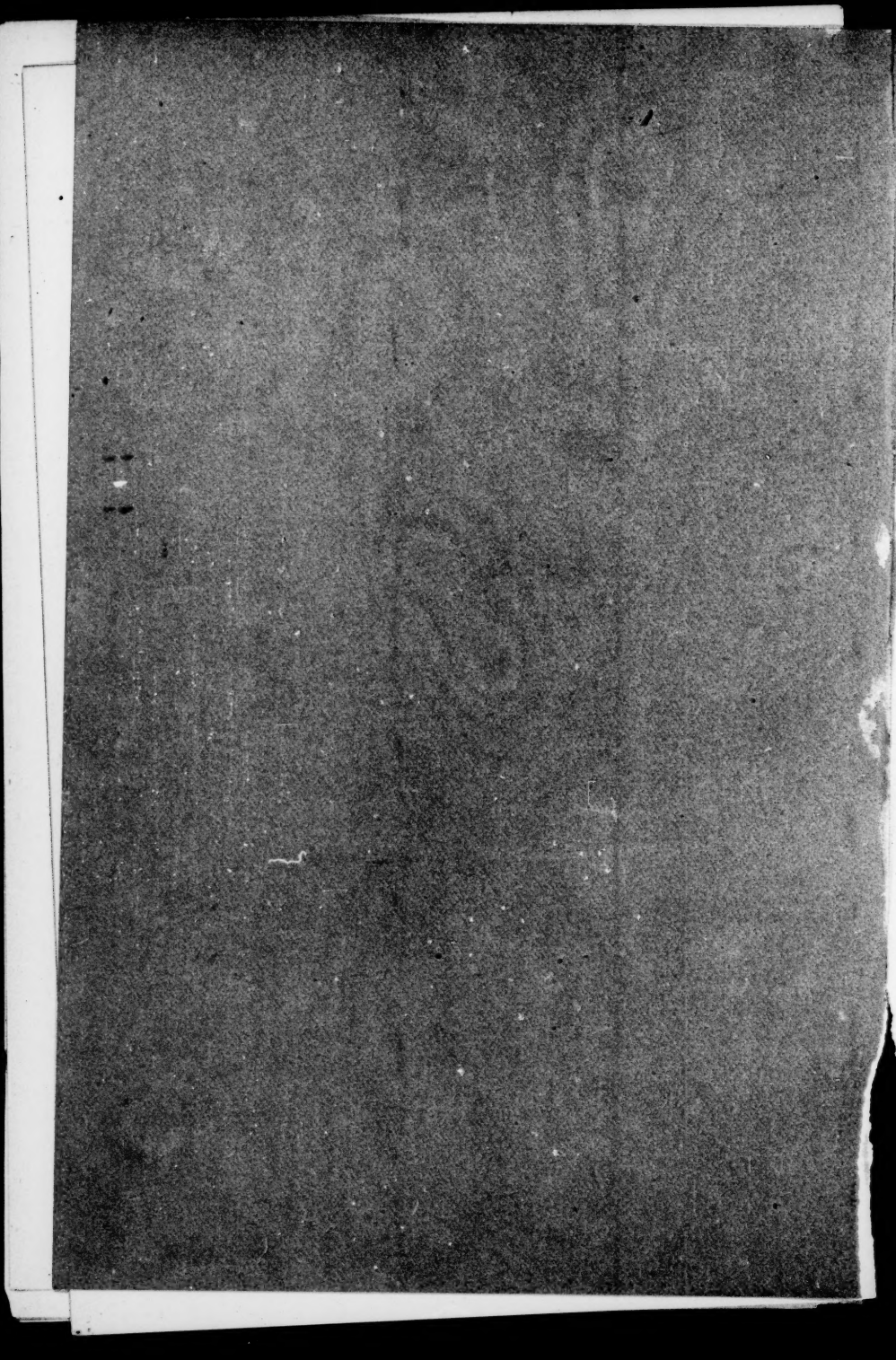
UNITED STATES, APPELLANT,

vs.

GEORGE E. WHITE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED AUGUST 4, 1884.



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1 UNITED STATES OF AMERICA.

Circuit court of the United States, ninth circuit, district of California.
In equity.

Subpœna.

The President of the United States of America, greeting, to George E. White:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the 4th day of September, A. D. 1882, to answer a bill of complaint exhibited against you in said court by the United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 107th.

[SEAL.]

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

2 Memorandum pursuant to rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit on or before the first Monday of September next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

[Endorsed.]

Service of subpœna.

U. S. MARSHAL'S OFFICE,
District of California.

I hereby certify that I received the within subpœna on the 18th day of July, 1882, and personally served the same on the 26th day of July, 1882, by delivering to and leaving with Geo. E. White, said defendant named therein, personally, at the county of Mendocino, in said district, a certified copy thereof.

M. M. DREW,
U. S. Marshal,
By A. PARKER,
Deputy.

SAN FRANCISCO, *July 29th*, 1882.

Filed July 29th, 1882. L. S. B. Sawyer, clerk.

2908

3 In the circuit court of the United States of America, ninth circuit, district of California.

Bill of complaint, in equity.

UNITED STATES OF AMERICA
vs.
GEORGE E. WHITE. } In equity.

To the judge of the ninth judicial circuit of the United States of America, in chancery, sitting in and for the district of California:

Benjamin Harris Brewster, Attorney-General of the United States, on behalf of the United States of America, brings this his bill in equity against George E. White, a resident of the county of Mendocino, State of California, and thereupon complains and says:

That on the 6th day of May, A. D. 1876, in pursuance of the several acts of Congress of the United States passed for the purpose of subjecting certain public lands of the United States to the right of pre-emption entry under the *institutions*, conditions, and stipulations as in said cases provided, the defendant herein, George E. White, filed in the Humboldt United States land office of the State of California, a pre-emption
4 declaratory statement for the north half of the northeast quarter of section twenty-two, and the south half of the southeast qnarter of section fifteen, in township four south, of range six, East Humboldt meridian, in district of lands subject to sale in the land district of Humboldt, State of California, containing one hundred and sixty acres of land of the public lands of the United States, the said George E. White alleging in said declaratory statement, settlement on said land on the 5th day of November, A. D. 1873; that on the 6th day of May, A. D. 1876, at the United States land office, at Humboldt, State of California, the defendant, George E. White, made the usual affidavit of pre-emption proof before C. F. Roberts, who was then and there the duly qualified register of said United States land office, and duly empowered to administer the oath to said White, which said affidavit, among other things, set forth that he, the affiant White, had made settlement on said land hereinbefore described; that he had settled upon said land on the 5th day of November, 1873, and that he had improved said land; that he had built a house thereon, and continued to reside therein from the time of his settlement until said 6th day of May, A. D. 1876, and cultivated about one-fourth of an acre for a garden, and fenced about an acre of said land, and
5 that he had a good frame house thereon, about nine by twelve feet in size, and that his improvements upon said land were of the value of about one hundred dollars; that said affidavit was then and there duly subscribed and sworn to by said George E. White, at Humboldt, State of California, before C. F. Roberts, the then duly qualified register of the United States land office of the Humboldt district, State of California.

Your orator further avers that on the said 6th day of May, A. D. 1876, said defendant, George E. White, made a further affidavit in support of his said pre-emption, as required by law, before the said C. F. Roberts, who was then and there the duly qualified register of said United States land office, and duly empowered to administer the oath to said George

E. White, which said affidavit, among other things, set forth in substance and effect that he was not the owner of three hundred and twenty acres of land in any State or Territory of the United States; that said affidavit was then and there duly subscribed and sworn to by said George E. White, at Humboldt, State of California, before C. F. Roberts, the then duly qualified register of the United States land office of the Humboldt district, State of California.

Your orator, further complaining, says that on the same day, to wit, on the 6th day of May, A. D. 1876, the defendant herein, George
6 E. White, paid to Solomon Cooper, the duly qualified receiver of the United States land office of the Humboldt land district, State of California, the sum of two hundred dollars, being a payment in full for the same land herein described as public lands of the United States, and known as the north half of the northeast one-quarter of section twenty-two, and south half of the southeast quarter of section number fifteen, in township number four, south of range number 6 east, of Humboldt meridian, containing one hundred and sixty acres of land, at one dollar and twenty-five cents for each acre, being payment for the same tract of land hereinbefore described, and which was the subject of pre-emption proof before said register.

That on the same day as herein set forth, to wit, on the 6th day of May, A. D. 1876, C. F. Roberts, the register of the United States land office of the Humboldt land district, issued to George E. White, the defendant herein, a certificate of purchase for the same portion of the public lands of the United States, to wit, the north half of the northeast quarter of section twenty-two, and the south half of the southeast quarter of section number fifteen, in township number four, south of range six east, Humboldt meridian, containing one hundred and sixty acres of
7 land, lying and being in Trinity County, State of California, being the same tract of land hereinbefore described, and which was the subject of pre-emption proof before the said register on the same day as aforesaid, as herein set forth.

Your orator, further complaining, says, that on the thirteenth day of December, A. D. 1876, the United States Government issued and delivered to the defendant, George E. White, a patent for lands described herein, to wit, the north half of the northeast quarter of section twenty-two, and the south half of the southeast quarter of section fifteen, in township four, south of range six east, Humboldt meridian, in the district of lands subject to sale at Humboldt, California, containing one hundred and sixty acres of land lying in the county of Trinity, State of California, which said patent is now outstanding.

Your orator, upon information and belief, charges and avers that the entry and pretended settlement of said defendant, George E. White, of the lands described herein, and the proof of settlement and improvements were not made and offered as aforesaid in good faith, but, on the con-
8 trary, were false, fraudulent, and illegal, and that the oath of said George E. White, on the 6th day of May, A. D. 1876, before said C. F. Roberts, the said register of the United States land office of the Humboldt district, State of California, was taken, subscribed, and sworn to falsely in the premises.

And your orator further charges, on information and belief, and avers

that the affidavit taken, duly sworn to, and subscribed by this defendant, George E. White, at Humboldt, State of California, on the 6th day of May, A. D. 1876, before C. F. Roberts, the then duly qualified register of of the United States land office of the Humboldt land district, State of California, to the effect that he was not the owner of three hundred and twenty acres of land in any State or Territory of the United States, was then and there taken, subscribed, and sworn to falsely by him the said George E. White.

Your orator, upon information and belief, further charges and avers that said defendant, George E. White, did not make actual settlement upon the lands hereinbefore described on the 6th day of November, A. D. 1873, or at any other time whatsoever, to wit, upon the north half of the northeast quarter of section twenty-two, and the south half of the southeast quarter of section fifteen, in township four, south of range six east,
9 Humboldt meridian, in the district of lands subject to sale at Humboldt, California, containing one hundred and sixty acres of land; that said defendant did not reside on said land, or in any house or building situated thereon, from the 5th day of November, A. D. 1873, until the 6th day of May, 1876, or at any time whatever during the period last mentioned or at any other time.

And your orator avers, on information and belief, that said defendant during the whole of the period last mentioned resided in Mendocino County, California, at a distance of not less than fifty miles from the land hereinbefore described as the pre-emption claim of said defendant.

Your orator, upon information and belief, further charges and avers that said defendant at the time he made his pre-emption proof was the owner of more than three hundred and twenty acres of land within the State of California, to wit, was the owner of upwards of two thousand acres of land within the aforesaid State; that by reason of the said fraudulent acts of the defendant herein, and the false and fraudulent affidavits and testimony offered and presented to the register and receiver of the United States land office of the Humboldt land district, State of California, by the defendant herein, as hereinbefore set forth, both such register and receiver was deceived and misled, to the manifest detriment of the United States
10 of America, and they were each of them, without suspicion of the false and fraudulent character of the said entry of the defendant, George E. White, and of the false and fraudulent character of the affidavits and testimony taken in support of settlement and proof of improvement, to issue the final recepts and final certificate to the defendant, George E. White, as hereinbefore set forth.

Your orator, upon information and belief, further charges and avers that upon the presentation of the final certificate of full payment by George E. White at the United States land department at Washington, the proper officers of the land department, without any suspicion of the false and fraudulent acts of the defendant herein, whereby and thereby the aforesaid certificate was issued, and being so misled and deceived, on the thirteenth day of December, A. D. 1876, issued and subsequently delivered to the defendant herein, George E. White, a patent for the land hereinbefore set forth and described, to wit, the north half of the northeast quarter of section twenty-two, and the south half of the southeast quarter of section fifteen, in township four, south of range six east, Humboldt merid-

ian, Humboldt district, State of California. In support of the
11 matters hereinbefore alleged, your orator beg, leave to refer to the aforesaid declaratory statement of the said defendant, George E. White, to all of the affidavits, papers, documents, depositions, receipts, certificates, and proceeedings, had before said register and receiver of the land office of Humboldt district, State of California, so far as the same relates to the entry, settlement, and improvement of the claim and proof of the same of George E. White for that portion of the public lands of the United States as described and set forth in this bill of complaint, to the field-notes, surveys, maps, and records of the public lands of the United States; also, to the records of the land department of the United States at Washington, or to certified copies thereof, and to the records of the counties of Trinity and Mendocino, or to certified copies thereof, and to the several acts of Congress relative to the public lands of the United States.

Wherefore your orator prays relief and the decree of the court that the patent to the land herein described be recalled and cancelled, and that the said defendant, George E. White, be estopped from asserting any title to said land described in said patent, and that the money paid by the said defendant, George E. White, to the receiver of the Humboldt
12 land district, State of California, on the 6th day of May, A. D. 1876, and all right and title to the same be forfeited to the United States, and that the land described in the patent be declared to be public land of the United States.

And that the United States may have such other and further relief as may seem to the court to accord with the principles of equity.

May it please the court to grant to the United States the writ of subpœna, issuing out and under the seal of this honorable court, directed to George E. White, commanding him, on a day certain to be named therein, to be and appear in this honorable court, to answer all and singular the premises, and to stand to and abide by and perform such other orders, directions, and decrees as may be made herein.

BENJAMIN H. BREWSTER,
Attorney-General.
PHILIP TEARE,
United States Attorney.

(Endorsed:) Filed July 18, 1882. L. S. B. Sawyer, clerk.

13 In the circuit court of the United States, ninth circuit and district of California.

Demurrer.

THE UNITED STATES, COMPLAINANT,
vs.
GEORGE E. WHITE, DEFENDANT.

This defendant, George E. White, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows:

That the said complainant hath not in and by his said bill made or

stated such a case as doth or ought to entitle it in a court of equity to any such relief as is thereby sought and prayed for, or to any relief as against this defendant as to the matters contained in said bill or any of such matters.

Wherefore this defendant, George E. White, prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things
14 therein contained, and asks to be hence dismissed with his reasonable costs in this behalf sustained.

LATIMER & MORROW, AND
BARCLAY HENLEY,
Solicitors for Defendant.
L. D. LATIMER, *Counsel,*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

L. D. LATIMER,
Counsel for said Def't.

Notarial deposition.

UNITED STATES OF AMERICA,
District of California, ss:

George E. White, the defendant aforesaid, being duly sworn, deposes and says that the foregoing demurrer is not interposed for delay.

G. E. WHITE.

Subscribed and sworn to before me, this 18th day of October, A. D. 1882.

[SEAL.] JOHN K. CHAMBERS,
Notary Public in and for the County of Mendocino, State of California.

(Endorsed:) Service of a copy of the within demurrer is hereby admitted this day of November, 1882, Philip Tearle, solicitor for U. S. Filed Nov. 1, 1882. L. S. B. Sawyer, clerk.

15 In the circuit court of the United States, ninth circuit, district of California.

Additional grounds of demurrer.

THE UNITED STATES, COMPLAINANT,
vs.
GEORGE E. WHITE, DEFENDANT. } No. 2849.

Leave of the court first having been obtained, the defendant adds to his demurrer on file herein the following additional ground of demurrer, to wit:

2nd. That the said bill is multifarious in that there are improperly

joined in said bill distinct and independant matters and alleged grounds of relief against the defendant, whereby they are confounded.

LATIMER & MORROW, AND
BARCLAY HENLEY,
Solictors for Defendant.
L. D. LATIMER, *Counsel.*

(Endorsed :) Filed April 4, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

16 United States circuit court, ninth circuit, district of California.

Enrollment.

THE UNITED STATES OF AMERICA, COMPLAINANT, *v.* GEORGE E. WHITE, DEFENDANT. } No. 2849.

The complainant filed its bill of complaint herein on the 18 day of July, 1882, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the 4' day of September, A. D. 1882, which is hereto annexed.

The defendant appeared herein on the 31st day of August, 1882, by Latimer & Morrow, his solicitors.

On the 1st day of November, 1882, a demurrer to said bill of complaint was filed which is hereto annexed.

On the 4' day of April, 1883, an additional ground of demurrer
17 was filed, which is hereto annexed.

Thereafter, to wit, on the 30th day of July, 1883, a decree was filed and entered herein in the words and figures following, to wit:

18 At a stated term, to wit, the July term, A. D. 1883, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 30th day of July, one thousand eight hundred and eighty-three.

Present, the honorable Lorenzo Sawyer, circuit judge.

Decree.

THE UNITED STATES OF AMERICA *vs.* GEORGE E. WHITE. } No. 2849.

This cause having come on to be heard at the last term of this court upon a demurrer to the bill of complaint, and having been argued by counsel and submitted to the court for consideration and decision, and the court, after due deliberation, having sustained the said demurrer, and no leave to amend said bill having been asked, ordered that a decree be entered herein in favor of the defendant, dismissing said bill for want of equity.

Thereupon, consideration thereof, it is ordered, adjudged,
19 and decreed that the said complainant's bill of complaint be, and the same hereby is, dismissed.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered July 30, 1883. L. S. B. Sawyer, clerk.

20 *Clerk's certificate.*

Whereupon, said pleadings, subpœna, and decree are hereto annexed, said decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

Attest, etc.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Endorsed:) Enrolled papers. Filed July 30, 1883. L. S. B. Sawyer, clerk.

21 *Opinion.*

In the circuit court of the United States, ninth circuit, district of California. No. 2849, and other causes. United States v. Geo. E. White; United States v. Wm. P. White; United States v. John P. White; United States v. L. B. Tuttle et al.

1. Jurisdiction, fraud. The United States have jurisdiction to vacate a patent to land in a proper case on the ground of fraud.

2. Fraud in procuring patent. The frauds for which courts will set aside a patent granted by the United States in the regular course of proceedings in the Land Office, are frauds extrinsic or collateral to the matter tried and determined upon which the patent issued, and not fraud consisting of perjury in the matter on which the determination was made.

22 3. Perjury and false testimony in the proceeding, by means of which a patent is secured by fraud, is not fraud extrinsic or collateral to the matter tried and determined in the Land Office within the meaning of the rule, and a patent will not be set aside on that ground alone.

4. Perjury, injury. Where no pecuniary injury to the United States is shown by the bill, and it does not appear that there is any other right in the land against the Government, whether a court of equity should set aside a patent obtained on false testimony, if otherwise proper. Query?

5. Return of purchase-money. Where the United States files a bill to set aside a patent, on the ground that it was obtained upon false testimony, it should, at least, offer to return the purchase-money paid by the patentee for the land.

6. Equity. When the United States comes into a court of equity asking equity like a private person, it should do equity.

7. Forfeiture, equity. Courts of equity never enforce penalties or forfeitures.

8. Forfeitures. If the United States desires to enforce the penalties

and forfeitures imposed by section 2262 of the Revised Statutes, for obtaining a patent to land upon false affidavits, it must do so by a proper proceeding at law, where the party charged will be entitled to a trial of the charge by a jury.

23 Before Sawyer, circuit judge. A. P. Van Duzer, for the United States; L. D. Latimer and Barclay Henley, for defendants.

SAWYER, circuit judge: The first of these cases, U. S. v. Geo. E. White, is a bill in equity to vacate a United States patent, issued to the defendant, on the ground that it was obtained upon false and fraudulent affidavits and proofs made under the pre-emption laws. It is alleged that on May 6, 1876, the defendant filed a declaratory statement under the pre-emption laws upon a quarter-section of land situate it Humboldt County, described in the bill, and an affidavit stating that he had settled upon the land on November 5, 1873, and resided thereon ever since; that he had cultivated a portion as a garden, built a fence around about an acre, and built a house 9 by 12; that the improvements were of the value of $100, and that he was not the owner of 320 acres of land elsewhere. It is further alleged that he paid the sum of two hundred dollars, and thereupon, and upon the making of said proofs a certificate of purchase in due form was issued to said defendant; and afterward, in pursuance of said certificate of purchase, a patent was issued, on Dec. 13, 1876. It is further alleged, upon information and belief that said affidavits and proof were false; that defendant did not make the settlement as stated, did not reside upon said
24 lands, and that he did own 320 acres of land elsewhere. And on the grounds of these false representations and proofs, the complainants ask that the patent be vacated and canceled, and that the money paid be adjudged forfeited to the United States.

There are numerous cases wherein the Supreme Court of the United States has said, in general terms, that a patent might be vacated for fraud on a bill of equity filed by the United States, as Moore v. Robbins, 96 U. S., 533; Theopley v. Cowan, 9 U. S., 330, and numerous others too familiar to require citation. There can, therefore, be no question as the jurisdiction of the court to entertain such a bill where a proper case is presented. But it was never determined what kind of fraud, or in what form perpetrated, would furnish a proper case for the relief sought in this case, till the case of the United States v. Flint and U. S. v. Throckmorton, in this court, 4 Saw., 51–3, affirmed in U. S. v. Throckmorton, 98 U. S., 68. These were cases wherein a petition was filed under the act of 1851, before the Board of Land Commissioners, for confirmation of a Mexican grant, which had been confirmed. It was alleged in the bill that the grant presented was a fraud; that it had been fabricated in Mexico after the transfer of California to the United States; that the fraud was concealed from the Government officers and the Board of Land Commissioners, and that the confirmation was obtained upon false and perjured testimony. On these grounds it was sought to vacate the patent in the first case
25 and the confirmation in the second, and annul the title. But the court decided that the confirmation could not be vacated on the ground that it was obtained wholly upon false and perjured testimony, or for the palpable frauds alleged. The court held (affirming the views ex-

pressed by the circuit court in 4 Sawy., 51–3) that the frauds for which the judgments of tribunals could be impeached are "frauds extrinsic or collateral to the matter tried by the first court," and do not extend "to a fraud in the matter on which the decision is rendered." Said the court, after citing and commenting on the authorities:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment of decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court and not to a fraud in the matter on which the decree was rendered.

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater by reason of the endless nature of the strife than any
26 compensation arising from doing justice in individual cases." (98 U. S., 68.)

The same rule was adopted in Vance v. Burbank, which also went up from this circuit, and the principle applied to the decision on a question of residence and of fraud, decided by the United States Land Office, where one private party sought to control, for his own use, the title granted to another upon alleged frauds practiced while obtaining the patent. Said the court by the chief justice:

"The appropriate officers of the land department have constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are.

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said there never has been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough if the disputed matter has actually been presented to or considered by the appropriate tribunal. (United States v. Throckmorton, 98 U. S., 61; Marques v. Frisby, supra.) The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute.

27 "The operative allegation in this bill is of false testimony only. * * * No fraud is charged on the register and receiver, or on the heirs of Perkins, in the respect of keeping back the evidence." (Vance v. Burbank, 101 U. S., 519.)

Thus the decisions of the Land Office, on application for patents, were put upon the same footing as judgments and decisions of courts and other tribunals like the board of land commissioners. The only difference between this case and the others is, that in the first the United States, and in the other the complainant, actually appeared, the United States not appearing, and were heard, while in this the United States did not formally appear as a contestant. But the principle is the same, only the mode of proceeding being different.

In the Flint and Throckmorton cases, the claimant, under his grant, the

treaty with Mexico and the statutes of the United States, petitioned the board for a confirmation of his grant. In this the purchaser, under and in conformity to the statutes, applied to the Land Office for leave to purchase, as did the party in Vance v. Burbank, and the Land Office, representing the United States, in due form heard the proofs and determined the question of the right to purchase.

In Vance v. Burbank the complainant intervened in fact, as he
28 had a right to do under the law, and contested the right of his opponent.

But the United States was not a party in any sense other than as a party in this case.

So in the present case, anybody claiming an adverse interest had a right to intervene, but nobody seems to have done so. The proceeding was in the nature of a proceeding in rem., of which everybody takes notice. The hearing was regularly had, and decided in favor of complainant, White; and the only fraud, if any there was, was "in the matter on which the decision was rendered," and not "extrinsic or collateral to the matter tried" and determined in the Land Office. The action of the Land Office is judicial in its nature. (Smelting Co. v. Kemp, 104 U. S., 640.) I can perceive no good reason why the principal should not apply to this case, as well as to the others, and especially to the case of Vance v. Burbank. That is the logical result of the principal established by the decisions cited, and I think the principal sound and upon the whole safe. Again, it is a principal that, with reference to private parties, a court of equity will not grant relief against a fraud unless it appears that some damage or injury has been sustained by reason of the fraud; for "courts of equity do not, any more than courts of law, sit for the purpose of
29 enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damages." (1 Sto. Eq. Ju., 203.) And when the United States enters the court as a litigant, * * * "it stands upon the same footing with private individuals." (U. S. v. Throckmorton, 4 Saw., 43.) It does not appear that the United States has been pecuniarily injured by the alleged fraud. No injury or damage is alleged, or in any way shown. The land was for sale to any duly authorized pre-emptioner at $1.25 per acre. Defendant paid the full amount of the purchase-money, and it went into the U. S. Treasury. The Government got all that it would have obtained from any other party. It does not appear that anybody else had any rights, or wanted to purchase, or that the United States was under any obligations to patent the land to any other person. There is no possible pecuniary injury to complainant. The most that can be said is that a principle of public policy was violated, and thereby a moral wrong resulted by reason of the legal disqualification, under the pre-emption act, of complainant to purchase. But the wrong was only malum prohibitum, not malum per se. It is by no means clear that the demurrer ought not to be sustained on this ground, but it is unnecessary to so decide now, for in my judgment
30 it is not a case to be taken out of the rule established in the cases cited of Throckmorton and Vance.

In view of the notorious liberality in favor of purchasers, not to say looseness with which the pre-emption laws have, ever since their adoption, been administered all over the Western States, to relax the rules

referred to in the authorities cited, especially where no actual pecuniary damage or injury has resulted, either to the Government or private parties, and "retry every case in which" the action of the Land Office as well as judgments or decrees rendered on false testimony given by perjured witnesses, or on contracts, or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent," would open a Pandora's box of evils "far greater than any compensation arising from doing justice in individual cases."

It would open the door to any party, stimulated by malice or other unworthy motice, who could upon ex parte and false statements obtain the ear of the Attorney-General, to promote suits in the name of the United States, to the great vexation of honest, as well as dishonest, pre-emptors; and to the great detriment of the public peace and prosperity.

Again, the claim is stale. Although statutes of limitation do not
31 run against the Government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere where the United States, as well as a natural person, is a complainant.

When the United States comes into a court of equity as a suitor it is subject to the defenses peculiar to that court (U. S. v. Tichnor, 8 Saw., 156; U. S. v. Flint, 4 Saw., 58–'9; Badger v. Badger, 2 Wall., 94; Stearns v. Page, 7 How., 829). Under the State law this suit, if between private parties alone, would be barred within three years (Manning v. San Jacinto Tin Co., 7 Saw., 430). Six years elapsed between the issue of the patent and the filing of the bill, and no averment is made to show that the fraud was not discovered, or by the exercise of ordinary diligence in the Land Office might not have been discovered immediately after its consummation.

The money received is retained, and no tender appears to have been made, nor is any offer to refund the money made in the bill. The United States, like an individual, when it comes into court and demands equity, must do equity, or, at least, offer to do equity. It has received the full value of the land in money, the same amount that it would have
32 received had the land been sold and patented to an admittedly qualified purchaser. It cannot keep the money, and, in a court of equity, demand and receive a return of the lands.

To meet this point, and as a basis for a decree for forfeiture of the money, as a part of the relief demanded in the bill, the U. S. attorney relies on section 2262 R. S., which provides that "if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same."

This is highly penal, and the only remedy, or rather punishment, other than an indictment for perjury, that appears to be provided by law for the wrong *dought* to be redressed. But the United States has come into the wrong forum to enforce this penalty.

"It is a universal rule in equity never to enforce either a penalty or forfeiture" (2 Sto. Eq. Ju., secs. 1319, 1494, 1509). So a bill of discovery will not lie in a case which involves a penalty or forfeiture (ib.). As an answer on oath is not waived, this bill is, in that particular, a bill of discovery, and demurrable on that ground also.

If the United States desires to enforce the penalties (the forfeiture
33 of the money paid and the land patented) provided for in section 2262 R. S., cited, it must proceed in some appropriate mode at law, where the defendant will be entitled to a trial by a jury of the question as to giving false testimony.

In my judgment the demurrer should be sustained and the bill dismissed, and it is so ordered.

July 30, 1883.

(Endorsed:) Read in open court July 30th, 1883. L. S. B. Sawyer clerk.

34 At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America of the ninth judicial, circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Tuesday, the 13th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present, the honorable Lorenzo Sawyer, circuit judge.

Order allowing appeal.

THE UNITED STATES OF AMERICA
vs.
GEORGE E. WHITE. } No. 2849.

On motion of S. G. Hilborn, esqr., U. S. attorney, solicitor on behalf of the complainant, it is ordered that an appeal from the decision
35 rendered and the decree filed and entered in the above-entitled cause on the 30th day of July, A. D. 1883, being a day in the July term, A. D. 1883, of said circuit court of the United , be and the same hereby is allowed, and that a certified transcript of the pleadings and proceedings be forthwith transmitted to the Supreme Court of the United States.

36 In the circuit court of the United States for the district of California.

THE UNITED STATES OF AMERICA
vs.
GEORGE E. WHITE. } No. 2849.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing thirty-five written pages, numbered from 1 to 35 inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said circuit court this 29th day of May, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

37 UNITED STATES OF AMERICA, *ss:*

To George E. White, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 13th day of October, A. D. 1884, pursuant to an order granting an appeal to said Supreme Court, made and entered by the circuit court of the United States for the district of California in the cause entitled The United States of America against George E. White, and you are defendant in error, to show cause, if any there be, why the decree in the said order mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, circuit judge of the United States ninth judicial circuit, for the district of California, this 20th day of May, A. D. 1884, and of the Independence of the United States the one hundred and eighth.

[SEAL.] LORENZO SAWYER,
Circuit Judge, Ninth Judicial Circuit.

38 We hereby admit service of the within citation & receipt of a certified copy thereof this 21st day of May, 1884.

LATIMER & MORROW,
Att'ys for Defendant.

(Indorsed:) No. 2849. In the Supreme Court of the United States. The United States of America, appellant, vs. George E. White, appellee. Citation. Filed May 21st, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

(Indorsement on cover:) No. 274. The United States, appellant, vs. George E. White. California C. C. U. S. Filed August 4th, 1884.

122 647

Office Supreme Court U. S.
FILED.
APR 26 1887
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

UNITED STATES, APPELLANT,
vs.
GEORGE E. WHITE. } No. 274.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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To George E. White, greeting:

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Witness the honorable Lorenzo Sawyer, circuit judge of the United States ninth judicial circuit, for the district of California, this 20th day of May, A. D. 1884, and of the Independence of the United States the one hundred and eighth.

[SEAL.] LORENZO SAWYER,
Circuit Judge, Ninth Judicial Circuit.

38 We hereby admit service of the within citation & receipt of a certified copy thereof this 21st day of May, 1884.

LATIMER & MORROW,
Att'ys for Defendant.

(Indorsed:) No. 2849. In the Supreme Court of the United States. The United States of America, appellant, vs. George E. White, appellee. Citation. Filed May 21st, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

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UNITED STATES, APPELLANT,
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GEORGE E. WHITE. } No. 274.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

In the Supreme Court of the United States

OCTOBER TERM 1886.

UNITED STATES, APPELLANT,
vs.
GEORGE E. WHITE. } No. 274.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRCT OF CALIFORNIA.

ABSTRACT.

The United States, on the 18th of July, 1882, filed an appeal in equity to cancel a patent to 160 acres of land in the land district of Humboldt, in the State of California. The ground for cancellation alleged was, that the several oaths necessary to entitle the defendant to enter the land under the provisions of the pre-emption laws were made by the defendant, but were false and fraudulent; that he had not resided upon the land; that he had not built upon it; that he was the owner of more than 320 acres of land in the State of California at the time he made the entry and received his certificate of payment and patent. The patent was issued to him on the 13th of De-December, 1882, and delivered to him at a later date.

The officers of the land office were ignorant of the fraud till after the delivery of the patent. The defendant demurred to the bill. The court entered judgment on the demurrer, dismissing the bill for want of equity.

Bill.

UNITED STATES OF AMERICA
vs.
GEORGE E. WHITE. } In equity.

To the judge of the ninth judicial circuit of the United States of America, in chancery, sitting in and for the district of California:

Benjamin Harris Brewster, Attorney-General of the United States, on behalf of the United States of America, brings this his bill in equity against George E. White, a resident of the county of Mendocino, State of California, and thereupon complains and says:

That on the 6th day of May, A. D. 1876, in pursuance of the several acts of Congress of the United States passed for the purpose of subjecting certain public lands of the United States to the right of pre-emption entry under the institution, conditions, and stipulations as in said cases provided, the defendant herein, George E. White, filed in the Humboldt United States land office of the State of California a pre-emption declaratory statement for the north half of the northeast quarrer of section twenty-two, and the south half of the southeast quarter of section fifteen, in township four south, of range six east, Humboldt meridian, in district of lands subject to sale in the land district of Humboldt, State of California, containing 160 acres of land of the public lands of the

United States, the said George E. White alleging in said declaratory statement, settlement on said land on the 5th day of November, A. D. 1873; that on the 6th day of May, A. D. 1876, at the United States land office at Humboldt, State of California, the defendant, George E. White, made the usual affidavit of pre-emption proof before C. F. Roberts, who was then and there the duly qualified register of said United States land office, and duly empowered to administer the oath to said White, which said affidavit, among other things, sets forth that he, the affiant White, had made settlement on said land hereinbefore described; that he had settled upon said land on the 5th day of November, 1873, and that he had improved said land; that he had built a house thereon, and continued to reside therein from the time of his settlement until said 6th day of May, A. D. 1876, and cultivated about one-fourth of an acre for a garden, and fenced about an acre of said land, and that he had a good frame house thereon, about 9 by 12 feet in size, and that his improvements upon said land were of the value of about one hundred dollars; that said affidavit was then and there duly subscribed and sworn to by said George E. White, at Humboldt, State of California, before C. F. Roberts, the then duly qualified register of the United States land office of the Humboldt district, State of California.

Your orator further avers that on the said 6th day of May, A. D. 1876, said defendant, George E. White, made a further affidavit in support of his said pre-emption, as required by law, before the said C. F. Roberts, who was then and there the duly qualified register of said United States land office, and duly empowered to administer the oath to said George E. White, which said affidavit, among other things, set forth in substance and effect that he was not the owner of 320 acres of land in any State or Territory

of the United States; that said affidavit was then and there duly subscribed and sworn to by said George E. White, at Humboldt, State of California, before C. F. Roberts, the then duly qualified register of the United States land office of the Humboldt district, State of California.

Your orator, further complaining, says that on the same day, to wit, on the 6th day of May, A. D. 1876, the defendant herein, George E. White, paid to Solomon Cooper, the duly qualified receiver of the United States land office of the Humboldt land district, State of California, the sum of $200, being a payment in full for the same land herein described as public lands of the United States, and known as the north half of the northeast quarter of section twenty-two, and south half of the southeast quarter of section number fifteen, in township number four, south of range number six east of Humboldt meridian, containing 160 acres of land, at $1.25 for each acre, being payment for the same tract of land hereinbefore described, and which was the subject of preemption proof before said register.

That on the same day as herein set forth, to wit, on the 6th day of May, A. D. 1876, C. F. Roberts, the register of the United States land office of the Humboldt land district, issued to George E. White, the defendant herein, a certificate of purchase for the same portion of the public lands of the United States, to wit, the north half of the northeast quarter of section twenty-two, and the south half of the southeast quarter of section number fifteen, in township number four south, of range sixth east, Humboldt meridian, containing one hundred and sixty acres of land, lying and being in Trinity County, State of California, being the same tract of land hereinbefore described, and which was the sub-

ject of pre-emption proof before the said register on the same day as aforesaid, as herein set forth.

Your orator further complaining, says, that on the 13th day of December, A. D. 1876, the United States Government issued and delivered to the defendant, George E. White, a patent for lands described herein, to wit, the north half of the northeast quarter of section 22, and the south half of the southeast quarter of section 15, in township four, south of range 6 east, Humboldt meridian, in the district of lands subject to sale at Humboldt, California, containing 160 acres of land lying in the county of Trinity, State of California, which said patent is now outstanding.

Your orator, upon information and belief, charges and avers that the entry and pretended settlement of said defendant, George E. White, of the lands described herein, and the proof of settlement and improvements, were not made and offered as aforesaid in good faith; but, on the contrary, were false, fraudulent, and illegal, and that the oath of said George E. White, on the 6th day of May, A. D. 1876, before said C. F. Roberts, the said register of the United States land office of the Humboldt district, State of California, was taken, subscribed, and sworn to falsely in the premises.

And your orator further charges, on information and belief, and avers that the affidavit taken, duly sworn to and subscribed by this defendant, George E. White, at Humboldt, State of California, on the 6th day of May, A. D. 1876, before C. F. Roberts, the then duly qualified register of the United States land office of the Humboldt land district, State of California, to the effect that he was not the owner of 320 acres of land in any State or Territory of the United States, was then and there taken, subscribed,

and sworn to falsely by him, the said George E. White.

Your orator, upon information and belief, further charges and avers that said defendant, George E. White, did not make actual settlement upon the lands hereinbefore described on the 6th day of November, A. D. 1873, or at any other time whatsoever, to wit, upon the north half of the northeast quarter of section twenty-two, and the south half of the southeast quarter of section fifteen, in township four south, of range sixth east, Humboldt meridian, in the district of lands subject to sale at Humboldt, California, containing 160 acres of land; that said defendant did not reside on said land, or in any house or building situated thereon, from the 5th day of November, A. D. 1873, until the 6th day of May, 1876, or at any time whatever during the period last mentioned or at any other time.

And your orator avers, on information and belief, that said defendant, during the whole of the period last mentioned, resided in Mendocino County, California, at a distance of not less than fifty miles from the land hereinbefore described as the pre-emption claim of said defendant.

Your orator, upon information and belief, further charges and avers that said defendant, at the time he made his pre-emption proof, was the owner of more than 320 acres of land within the State of California, to wit, was the owner of upwards of 2,000 acres of land within the aforesaid State; that by reason of the said fraudulent acts of the defendant herein, and the false and fraudulent affidavits and testimony offered and presented to the register and receiver of the United States land office of the Humboldt district, State of California, by the defendant herein, as hereinbefore set forth, both such register and receiver was deceived and misled, to the manifest detriment

of the United States of America, and they were each of them, without suspicion of the false and fraudulent character of the said entry of the defendant, George E. White, and of the false and frandulent character of the affidavits and testimony taken in support of settlement and proof of improvement, to issue the final receipts and final certificates to the defendant, George E. White, as hereinbefore set forth.

Your orator, upon information and belief, further charges and avers that upon the presentation of the final certificate of full payment by George E. White, at the United States Land Department at Washington, the proper officers of the Land Department, without any suspicion of the false and fraudulent acts of the defendant herein, whereby and thereby the aforesaid certificates was issued, and being so misled and deceived, on the 13th day of December, A. D. 1876, issued and subsequently delivered to the defendant herein, George E. White, a patent for the land hereinbefore set forth and described, to wit, the north half of the northeast quarter of section 22, and the south half of the southeast quarter of section 15, in township 4 south, of range 6 east, Humboldt meridian, Humboldt district, State of California. In support of the matters hereinbefore alleged, your orator begs leave to refer to the aforesaid declaratory statement of the said defendant, George E. White, to all of the affidavits, papers, documents, depositions, receipts, certificates, and proceedings had before said register and receiver of the land office of Humboldt district, State of California, so far as the same relates to the entry, settlement, and improvement of the claim and proof of the same of George E. White for that portion of the public lands of the United States as described and set forth in this bill of complaint; to the field notes, surveys, maps, and records of the public lands of the United

States; also, to the records of the Land Department of the United States at Washington, or to certified copies thereof, and to the records of the counties of Trinity and Mendocino, or to certified copies thereof, and to the several acts of Congress relative to the public lands of the United States.

Wherefore your orator prays relief and the decree of the court that the patent to the land herein described be recalled and canceled, and that the said defendant, George E. White, be estopped from asserting any title to said land described in said patent, and that the money paid by the said defendant, George E. White, to the receiver of the Humboldt land district, State of California, on the 6th day of May, A. D. 1876, and all right and title to the same be forfeited to the United States, and that the land described in the patent be declared to be public land of the United States.

And that the United States may have such other and further relief as may seem to the court to accord with the principles of equity.

May it please the court to grant to the United States the writ of subpœna, issuing out and under the seal of this honorable court, directed to George E. White, commanding him, on a day certain to be named therein, to be and appear in this honorable court, to answer all and singular the premises, and to stand to and abide by and perform such other orders, directions, and decrees as may be made therein.

BENJAMIN H. BREWSTER,
Attorney-General.

PHILIP TEARE,
United States Attorney.

(Indorsed:) Filed July 18, 1882. L. S. B. Sawyer, clerk.

Demurrer.

THE UNITED STATES, COMPLAINANT,
vs.
GEORGE E. WHITE, DEFENDANT.

This defendant, George E. White, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows:

That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle it in a court of equity to any such relief as is thereby sought and prayed for, or to any relief, as against this defendant, as to the matters contained in said bill, or any of such matters.

Wherefore this defendant, George E. White, prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and asks to be hence dismissed with his reasonable costs in this behalf sustained.

LATIMER & MORROW, AND
BARCLAY HENLEY,
Solicitors for Defendant.
L. D. LATIMER, *Counsel.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

L. D. LATIMER,
Counsel for said Defendant.

Specification of error.

The court erred in entering a decree on the demurrer, dismissing the bill for want of equity, which decree is as follows:

Decree.

THE UNITED STATES OF AMERICA
vs.
GEORGE E. WHITE. } No. 2849.

This cause having come on to be heard at the last term of this court upon a demurrer to the bill of complaint, and having been argued by counsel and submitted to the court for consideration and decision, and the court, after due deliberation, having sustained the said demurrer, and no leave to amend said bill having been asked, ordered that a decree be entered herein in favor of the defendant, dismissing said bill for want of equity.

Thereupon, consideration thereof, it is ordered, adjudged, and decreed that the said complainant's bill of complaint be, and the same hereby is dismissed.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered July 30, 1883. L. S. B. Sawyer, clerk.

Clerk's certificate.

Whereupon, said pleadings, subpœnas, and decree are hereto annexed, said decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

Attest, etc.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Endorsed:) Enrolled papers. Filed July 30, 1883. L. S. B. Sawyer, clerk.

It is settled law that the United States by a bill in equity may cancel a patent for land issued by its officers through fraud, mistake, or want of power. (*Chase* v. *Robbins*, 96 U. S., 530.)

The officers of the land office are agents of the Government; their powers are statutory and must be strictly pursued, and a court of equity cannot relieve against a defective execution of the power. (*Bright* v. *Boyd*, 1 Story Report, 487.)

They are only authorized under the pre-emption laws to convey lands upon certain conditions. Among those conditions are that the pre-emptor shall make settlement, inhabit, and improve the land; shall erect a dwelling thereon, and that he shall not be the owner of 320 acres of land in any State or Territory. (Rev. Stat., §§ 2259, 2262.)

The bill in this case sets forth that none of these conditions had been performed by the pre-emptor. All he did was to go to the land office and make, as is alleged, two false oaths, pay for the land and receive a certificate and patent for it. If he had not made the false oaths, but had simply gone and paid the money, his title would have been void. A sale by private entry before a public offering, as required by law, was ruled void in the case of *Eldred* vs *Sexton* (10 Wallace, 197). Under the facts alleged in the bill the land pre-empted was really sold at private entry without a public offering and is void, unless the defect is remedied by the fact that the pre-emptor's false oath validates the sale. It is not reasonable that he shall be placed on a higher plane legally in consequence of these false and fraudulent oaths than if he had not sworn falsely. The false oaths should at least be regarded as a nullity, and as in that event the officers acted without power, the

Specification of error.

The court erred in entering a decree on the demurrer, dismissing the bill for want of equity, which decree is as follows:

Decree.

THE UNITED STATES OF AMERICA
vs.
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Thereupon, consideration thereof, it is ordered, adjudged, and decreed that the said complainant's bill of complaint be, and the same hereby is dismissed.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered July 30, 1883. L. S. B. Sawyer, clerk.

Clerk's certificate.

Whereupon, said pleadings, subpœnas, and decree are hereto annexed, said decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

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defendant holds a patent for land the right and title to which is in the Government, and the patent should be canceled.

The action of the land officers being in excess of their statutory power, and the assumption of that power having been induced by the false and fraudulent oaths and devices of the grantee, who is the present holder of the patent, it is said such fraud, having preceded the action of the officers is not of such a character as will warrant the restitution of the rights, as it is barred by the granting of the certificate and patent. To sustain this view, the case of *United States* v. *Throckmorton* (98 *U. S.*, 68), is cited. That case does not sustain the doctrine; the judgment of a court was there introduced, and it was ruled a bar, because the judgment was judicial, directly on the same subject-matter, and final. The ruling and action of the officers of the land office was administrative and not judicial. No authority can be produced carrying the doctrine further than that the judgment of a judicial, or quasi-judicial, tribunal bars an inquiry for fraud by them passed upon. A quasi-judicial inquiry may be had before the officers of the land office. But to fall within this rule there must be a contest, in which event the register and receiver hear the parties, or their attorneys, and arrive at a conclusion which might in this act be construed quasi-judicial. But in this case there was no contest; there was no similtude of a hearing, no parties introduced before any alleged tribunal; it was a mere formal administrative act, done by executive officers in the discharge of the executive duty required by the statute, and the witnesses were not subject to any examinations or cross-examinations.

The principle cited is therefore not applicable to this case, and to introduce it now into the law would be a novelty fraught with great evils.

The case of *U. S.* vs. *Burbank* (101 U. S., 519) was decided concerning a contest tried before the officers of the Land Office, in which both parties were fully heard. The case of *Smelting Co.* v. *Kemp* (104 U. S., 640) was an action at law, and in that case the doctrine of the validity of the action of the Land Department is qualified with the proviso that the alleged wrong must have been brought to its notice. In other words, it must have been the subject of contest and passed upon by the Department.

The suggestion in the opinion of the circuit court, that the United States has suffered no damage, in the face of the fact that the law forbids the grant of the patent, is entitled to little weight; that the law has been violated and its provisions evaded by fraud gives rise to the conclusive presumption of damage.

That the claim is stale because it was not prosecuted within six years is no answer to the equity; for "Laches of the officers or agents of the Government is confessedly no bar to the assertion of its rights." *Gusson* v. *U. S.*, 97 U. S., 590.

The ground that equity "will never enforce a penalty" is inapplicable, for the prayer for a forfeiture of the money paid is only surplusage in the prayer. The substantive prayer of the bill is that the patent shall be cancelled. This is not a forfeiture; it is only a judicial determination that the evidence by which the defendant holds of title to the land is void and valueless against the party defrauded. The prayer for forfeiture which the court would not in equity grant does not deprive the court of power to grant such other prayers in the same bill as justice and equity demand.

G. A. JENKS,
Solicitor-General.

122-647

FILED
APR 27 1887
JAMES H. McKENNEY
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In the Supreme Court of the United States.

UNITED STATES, APPELLANT,
vs.
GEORGE E. WHITE, APPELLEE.

October Term, 1886.
No. 274.

BRIEF FOR APPELLEE.

JAMES K. REDINGTON,
Counsel for Appellee.

Beresford, Printer,
Washington, D. C,

IN THE

Supreme Court of the United States.

UNITED STATES, *Appellant*,
vs.
GEORGE E. WHITE, *Appellee*.
} October Term 1886.—No. 274.

Appeal from the Circuit Court for the 9th circuit, District of California.

Brief for Appellee.

STATEMENT.

On the 18th day of July, 1882, the United States filed its bill in equity against White, the appellee, to vacate and cancel a patent issued to him for the premises in controversy, bearing date the 13th day of December, 1876. This patent was issued as the result of, and was based upon, certain antecedent proceedings under the preëmption law. The bill charges, upon information and belief, that the affidavits and testimony of the patentee, forming what is technically known as his preëmption proof, were false; denies the facts therein alleged; avers that the claimant in no respect complied with the law; and prays that the patent be recalled and cancelled, the consideration money forfeited to the United States and the premises declared to be public land.

To this bill the defendant filed a demurrer, which, upon hearing, was sustained by the court below, and the United States appealed.

Neither in the record nor elsewhere is there any showing whatever that the value of premises in dispute exceeds the sum of five thousand dollars.

BRIEF.

The appellee insists that the case should be dismissed for want of jurisdiction.

An appeal will be dismissed when it does not appear by the record or otherwise that the value of the matter in dispute exceeds five thousand dollars.

Parker *vs.* Morrill, 106 U. S., 1, 2.

No considerations as to the time or form of the objection enter into the question. Whenever and however the fact appears the case will be dismissed.

Richmond *vs.* Milwaukee, 21 How., 80–82, 391.
Johnson *vs.* Wilkins, 116 U. S., 392.
118 *Ib.*, 228.

Even when the parties are silent or the record is so framed as to give a colorable jurisdiction, the court will, upon its own motion, dismiss the case.

Webster *vs.* Buffalo Ins. Co., 110 U. S., 386.
Bowman *vs.* C. & N. W. R. R. Co., 115 *Ib.*, 611.

And although a defect in jurisdiction apparent in the record, may be cured by affidavits, yet the showing must be made before the argument, and a case will neither be continued nor reinstated to give an opportunity to produce them.

Rush *vs.* Parker, 5 Cr., 287, Livingston, J.
Richmond *vs.* Milwaukee, 21 How., 80–82, 391.
Johnson *vs.* Wilkins, 118 U. S., 228, 229.

Rule 13 of the original rules of this court, adopted August 15, 1800, was as follows :

"That the plaintiff in error be at liberty to show, to the satisfaction of the court, that the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, this to appear by affidavit, &c." (1 Cranch, p. XVIII.)

This rule appears to have arisen from an order made in the case of Course *vs.* Steadman, (4 Dall., 22,) referring to Williamson *vs.* Kinkaid (*Ibid* 19), in both of which, however, the affidavits were filed before the case was reached for argument.

Following the adoption of this rule came the cases of Rush *vs.* Parker, (5 Cranch, 287,) and *ex parte* Bradstreet, (7 Peters, 634.) In the former the court refused a continuance, and Livingston, J., entered a vigorous dissent from the allowance of any time whatever. In the latter case, mandamus to the Circuit Court of the Northern District of New York, the writ issued because the court below had, in effect, by dismissing the suit, (writ of right,) prevented the plaintiff from proving the value at the trial, which the court declared was his legal right. Both cases, however, were under the operation of the original rule 13.

At the December term, 1858, the rules were revised, and the old rule 13 was entirely omitted (21 How., pp. I, *et seq*). And at this same term the court decided the case of Richmond *vs.* Milwaukee, (21 How., 391,) emphatically asserting the rule that affidavits of value, even in permissible cases, must be filed before the case is reached for hearing.

In this last mentioned case, Chief Justice Taney, delivering the opinion of the court, said:

"And in the classes of cases above mentioned, in which affidavits are received, there is no instance in which a case has been postponed or reinstated in order to give the party time to produce affidavits of value. Indeed, such a practice would be irregular and inconvenient, and might sometimes produce conflicting affidavits and bring on a controversy about value, occupying as much of the time of the court as the merits of the case."

And the only instance, so far as the researches of counsel have enabled him to discover, in which time was ever allowed for this purpose, after the case was reached for argument, is the "The Grace Girdler," 6 Wall., 441, when twenty days was allowed for that purpose. But the Court, in its opinion, itself suggests a doubt on the point by a reference to the case of Richmond *vs.* Milwaukee, (*supra*,) and the controlling consideration leading to the order seems to have been the fact that the case was in admiralty, "where the pleadings may be amended and new evidence taken in the appellate court," and where "a liberal practice in relation to appeals is specially warranted."

It is earnestly submitted that the United States, fully equipped for any conceivable legal warfare, ought not now, when the case is reached for argument, five years after the filing of her bill, and four years after the perfection of her appeal, to be allowed further time to supply defects in her case, which she is even now unable to say are curable. I feel justified in urging that in this case no considerations exist warranting a relaxation of the plain rules of law and of sound judicial policy, merely to allow the United States to ascertain whether or not she has a right of appeal to this court. She ought to have set out in her bill the value of the property. Failing which, and invoking the jurisdiction of this court, she ought long since to have supplied the defect by affidavits. She ought not now to be allowed to do so, even if the jurisdictional fact exists.

On the the merits of the demurrer no brief is submitted, inasmuch as the question already discussed ends the case, unless time is allowed the United States to file affidavits, in which event the appellee asks leave to file counter affidavits, and be heard upon the demurrer.

Respectfully submitted,

JAMES K. REDINGTON,
Counsel for Appellee.

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122-649

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 300.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA,
Plaintiff in Error,

versus

JAMES C. McKENZIE.

In Error to the Circuit Court of the United States, for the Middle District of Alabama.

BRIEF OF A. R. LAWTON, AND JOHN D. ROQUEMORE, COUNSEL FOR PLAINTIFF IN ERROR.

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BRIEF OF A. R. LAWTON, AND JOHN D. ROQUEMORE, COUNSEL FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This action was brought in the Circuit Court of Barbour county, Alabama, to recover damages for injuries alleged to have been done defendant in error, in the State of Georgia by the derailment of a train of cars operated in that State by the plaintiff in error, on the 8th of December, 1882. The complaint sets forth that the "defendant was engaged "in and carrying on the business of a common carrier, and "as such common carrier controlled and operated a railroad "for the carriage of freight and passengers for hire between "the city of Macon in the State of Georgia, and the city of

"Eufaula in the State of Alabama. * * * * * * * *
"And * * * plaintiff became and was a passenger upon "the regular passenger train of the defendant on the 8th "day of December, 1882, at Cuthbert, in the State of Geor- "gia, proposing to travel thence on said train to the city of "Eufaula, in the said State of Alabama, for a certain fare or "passage money exacted by said defendant and paid by "plaintiff; and thereupon it then and there became and was "the duty of the said defendant to safely carry and trans- "port said plaintiff from Cuthbert, in said State of Georgia, "to Eufaula, in said State of Alabama; yet the said defend- "ant, not regarding its duty in that behalf, permitted its "road-bed and its railroad track, and superstructure thereon "to become in such a bad condition and out of proper re- "pair, and it permitted its said train of cars to be managed, "controlled and run by such careless and indiscreet, incom- "petent and unskilled employees, and in such a careless "and negligent manner that by reason thereof on said 8th "day of December, 1882, and whilst the said train of cars "was running with the said plaintiff thereon in and along "said railroad track between said Cuthbert in the State of "Georgia, and said Eufaula in the State of Alabama, and "before its arrival in Eufaula in the State of Alabama, and "near Georgetown in the State of Georgia, the said train of "cars ran off of said railroad bed and off of said railroad "track, and was overturned and thrown down an embank- "ment, and by means whereof the said plaintiff was greatly "bruised, wounded and injured;" then follows an allegation of the injuries, said to have been suffered by the defendant in error.

Upon this complaint appears an affidavit by John M. McKleroy, one of the attorneys for the defendant in error, "that the president or other head of the defendant corpo- "ration, and the secretary, cashier, or other managing agent "thereof reside out of the State of Alabama;" the summons and complaint are endorsed by the clerk of the court, "filed "this the 24th day of March, 1883," and are endorsed by the

sheriff, "received in office this 24th day of March, 1883," and the following is the return of said summons and complaint by the sheriff, "executed this 26th day of March, "1883, by leaving a copy of the within summons and com- "plaint with Charles J. McLaughlin, a white person in the "employ of the Central Railroad and Banking Company of "Georgia."

At the June term, 1883, of the Circuit Court of Barbour county, the plaintiff in error filed in that court a petition praying for a removal of the cause to the Circuit Court of the United States for the Middle District of Alabama, and upon such petition, bond being filed as required by law, an order was made and entered removing said cause as prayed for, to said Circuit Court of the United States, and it stood for trial in said last named court at the November term, 1883, thereof.

An admission of counsel in the cause was entered into in writing, and filed in said Circuit Court of the United States that the plaintiff in error "is a foreign corporation, char- "tered and doing business in the State of Georgia, and that "under its act of incorporation it is a foreign corporation; "that prior to December 8th, 1882, it had leased the South- "western railroad, running from Macon, in the State of Geor- "gia, to Eufaula, in the State of Alabama; and that prior to "December 8th, 1882, and on said December 8th, 1882, and "since that time it had charge of said Southwestern railroad, "and had exclusive control of it, and was running its, defend- "ants, cars over said road as said lessee, as above stated."

At the November term, 1882, of said Circuit Court of the United States, the plaintiff in error filed a plea in abatement denying the jurisdiction of the Court of the cause of action, which plea was denied, and overruled by the Court.

At the same term of the Court, the plaintiff in error moved the court to set aside the service of the summons "because the contract set forth in the complaint was made "in the State of Georgia, and the defendant, at the time the "summons in this case was issued, and at the same time the

"contract was made, was a foreign corporation, incorporated "only under the laws of the State of Georgia, and the return "of the sheriff shows that service of the summons was made "upon Charles J. McLaughlin, a white person in the employ- "ment of the defendant, who was not the President, Vice- "President, Secretary, Treasurer, or managing agent of the "defendant corporation."

This motion to set aside the service of the summons was denied by the Court.

The cause was tried at the November term, 1883, and resulted in a judgment for defendant in error for $16,800 damages.

Upon the trial, the defendant in error was allowed to introduce testimony against the objection of the plaintiff in error, tending to show that there were decayed timbers in the track of the railroad along the line from Georgetown to Hatcher's Station, a distance of several miles, at other points than where the wrecking of the train occurred.

II.

ASSIGNMENT OF ERRORS RELIED UPON.

The Court erred as follows:

1. In overruling the plea to the jurisdiction of the Court, and in entertaining jurisdiction of the cause.
2. In overruling the motion to set aside the service of the summons.
3. In sustaining the demurrer to the motion to set aside the service of the summons.
4. In sustaining the demurrer to the plea in abatement.
5. In overruling the demurrer to the complaint.
6. In allowing the testimony of the witness Lancaster, as to the several conditions of the track of plaintiff in error at other places than that of the accident.
7. In refusing to rule out the testimony of the witness John Moore, as to the condition of the railroad track at other places than that of the accident.

8. In refusing to rule out the testimony of the witness Hatcher to the same effect.

9. In refusing to rule out the testimony of the witness Taylor Moore to the same effect.

10. In refusing to rule out the testimony of witness J. E. Smith to the same effect.

11. In charging the jury, that when treating and discussing the subject of transportation of passengers by steam, there is, perhaps, scarcely such a thing a slight negligence.

12. In charging the jury, in referring to the transportation of passengers, that where the interests are so great and life is involved, slight negligence under such circumstances when there is such responsibility resting upon the carrier, becomes, indeed, gross negligence in the eye of the law.

13. In charging the jury, that in estimating the damages of defendant-in-error, they should look to the future as well as the past, if the evidence shows that his condition of health, and his business capacity, and his pain and suffering will probably extend in the future as well as his injury from the time of the accident until now.

14. In refusing to charge the jury as requested by the plaintiff-in-error that a common carrier of passengers is not liable to the same extent that a common carrier is liable for the safety of property; that it does not insure the safety of passengers, nor is it responsible for injuries suffered by them from any other cause other than its own or its agent's negligence or wilful wrong.

15. In charging the jury that extraordinary diligence, care and prudence, aided by the highest skill, are required of common carriers of passengers.

16. In refusing to charge the jury as requested by the plaintiff-in-error that the presumption of negligence is slight.

17. In refusing to charge the jury as requested by the plaintiff-in-error that to justify them in taking into consid-

eration the future physical pain and suffering of the defendant-in-error, it must have been made reasonably certain that such future pain and suffering were inevitable, and if they were only probable or uncertain they could not be taken into the estimate.

18. In refusing to charge the jury as requested by the plaintiff-in-error that if there was no evidence before them as to the probable duration of defendant-in-error's life, they could not find damages for future loss he might sustain in consequence of his injuries.

III.

BRIEF OF ARGUMENT, WITH STATEMENT OF THE POINTS OF LAW, AND FACTS DISCUSSED.

1. The court should have sustained the plea to the jurisdiction of the court. The complaint (p. 1), the affidavit of defendant-in-error's counsel (p. 3), and the plea in abatement (p. 7), show that the tort complained of, was committed in the State of Georgia, that the plaintiff-in-error was, at the time and continuously ever since, a foreign corporation chartered under the laws of Georgia, and that none of its managing officers or agents resided out of the State of Georgia.

The suit having been brought in the Circuit Court of Barbour county, a State court, reference must be had alone to the right of that court to entertain jurisdiction of the cause. The laws of the State of Alabama alone must be relied on to give validity to the proceedings in the State court. Sec. 4 of Art. 14 of the Constitution of Alabama, in these words :

"no foreign corporation shall do any business in this "State without having at least one known place of business "an and authorized agent or agents therein, and such cor- "poration may be sued in any county where it does business "by service of process upon an agent anywhere in this State,"

is presumably the supposed authority of law for bringing the suit against the plaintiff in error in Alabama. Part 3 of the Code of Alabama, 1876, p. 689, relates to "proceeding in "civil cases": Title 1, of part 3, relates to "proceedings in "civil actions in courts of common law": Chapter 3 of that title relates to the "issue, execution and return of the sum- "mons," in actions at law: Section 2934, occurring in this chapter is in these words:

"When the suit is against a corporation, the summons "may be executed by the delivery of a copy of the summons "and complaint to the president, or other head thereof, sec- "retary, cashier or managing agent thereof."

Section 2935 thereof is in these words:

"If affidavit is made that the officers named in the pre- "ceding section are unknown, or reside out of the State, the "summons may be served on any white person in the employ "of or doing business for such corporation."

No other authority or claim, of the right to bring this suit in the courts of Alabama can be given. No action *in personam* can be maintained against a corporation out of the State of its creation, although it does business in another State, without express provision of law for bringing such suit, and getting service upon such corporation, or its voluntary appearance.

Andrews v. Mich. Cent. R. R. Co., 99 Mass. 534.

Congar v. Galena & Chicago Union R. R. Co., 17 Wis. 477.

Middough v. St. Jo. & Denver R. R. Co., 51 Mo. 520.

Lathrop v. Union Pac. R. R. Co., 1 McAuthur (Dist. C.) 234.

Barnett v. Chicago & Lake Hudson R. R. Co., 6 Thompson & Cook, (N. Y. Sup. Ct.) 358.

Ogdensburg & Champlain R. R. Co., v. Canada R. R. Co., 16 Abb. Pr. N. S. 249.

s. c. 4 Hun 712.

Brooks v. N. Y. Gr. Lake R. R. Co., 30 Hun 47.

See also, Webster v. Reid, 11 How. 437.
Pennoyer v. Neff, 95 U. S. 714.
St. Clair v. Cox, 106 U. S. 350.
Earle v. McVeigh, 91 U. S. 503.
Settlemier v. Sullivan, 95 U. S. 444.

The Supreme Court of Alabama construing the provision of the Constitution of Alabama and the sections of the Code authorizing suits against foreign corporations, has decided that in actions *in personam*, a foreign corporation cannot be sued in Alabama, unless the contract sued on was made or the injury complained of was suffered within the State. The case in which the decision was made, arose out of the same accident wherein defendant in error is alleged to have been injured. In that case (Central R'd. & Banking Co. v. Carr, 76 Ala. 388,) the Court says:

"It is claimed for appellee that the present suit is au-
"thorized by section 2935 of the Code, the substance of which
"is given above." (The section quoted on page seven of the brief.) "We have other statutes which provide for
"service of process when non-resident corporations do busi-
"ness in this State. Section 1434 of the Code relates to fire
"insurance companies, incorporated in other States, and
"taking risks in this. Section 1444 makes similar provision
"for foreign life insurance companies doing business in this
"State. See Constitution of Alabama, art. 14, section 4.
"In W. U. Tel. Co. v. Pleasants, 46 Ala. 641, the court held
"that in case of a foreign corporation doing business in this
"State through a managing agent, service of summons and
"complaint on such agent will give jurisdiction to our courts
"of a cause of action which originates in this State. The
"same principle is declared in *Ex parte* Schollenberger, 96
"U. S. 369; Osborne v. Ins. Co., 51 Vt. 278. It is well set-
"tled, however, that no action *in personam* can be maintained
"against a foreign corporation, unless the contract sued on
"was made, or the injury complained of was suffered in the
"State in which the action is brought."

Central R. R. & Banking Co., v. Carr, 76 Ala., 388.
Bawknight v. L. L. & G. Ins. Co., 55 Ga., 194.
Sawyer v. N. Am. Life Ins. Co. 46 Vt., 697.
Smith v. Mut. Life Ins. Co., 14 Allen, 386.
St. Clair v. Cox, 106, U. S., 350.
Newell v. Gt. W. Ry. Co. of Canada, 19 Mich., 336.
Parke v. Commercial Ins. Co., 44 Penn. St., 422.
Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. Law, 15.

2. The court should have set aside the service of the summons.

Authorities, *supra.*

3. The court should have overruled the demurrer to the motion to set aside the service of the summons.

Authorities, *supra.*

This demurrer is shown to have been upon the ground, "that the same" (referring to the motion to set aside the service of the summons,) "is insufficient in law." Judgment entry, p. 9. The chapter in the Code of Alabama, 1876, relating to pleadings, contains a section, 3005, in these words: "No demurrer in pleading can be allowed, but to "matter of substance which the party demurring specifies; "and no objection can be taken or allowed which is not dis-"tinctly stated in the demurrer." This statute, though plain and unambiguous, has been many times construed by the Supreme Court of Alabama; and it has been uniformly held that such general demurrer is insufficient and should be disregarded. 68 Ala., 126; 66 Ib. 521; 65 Ib. 79, 88, 566; 62 Ib. 550; 60 Ib. 563; 33 Ib. 110; 34 Ib. 485; 35 Ib. 529, 723; 52 Ib. 444.

4. The court should have overruled the demurrer to the plea in abatement. This demurrer was, for that, "said plea in abatement is insufficient in law." See judgment entry, p. 9.

Authorities *supra.*

The Federal courts must follow the decisions of the

State courts in interpreting State laws. The interpretation within a State of a local law, becomes a part of that law as much as if incorporated in it by the legislature.

U. S. Statute at large, sec. 721, p. 136.
Christy v. Pridgeon, 4 Wall, 176.
Bk. of Augusta v. Earle, 13 Peters, 519.
Claiborne Co. v. Brooks, 111 U. S. 400.
Smith v. Kernochen, 7 How. 198.
Secombe v. R. R. Co., 23 Wall, 108.
Burgess v. Seligman, 107 U. S., 20.
Luther v. Borden, 7 How. 1; 7 How. 812; 14 Ib. 488; 1 Wall, 175; 92 U. S. 209; 94 U. S. 260; 100 U. S. 47; 105 U. S. 667; 98 U. S. 359; 9 Wall, 35; 18 Wall, 71; 6 Pet. 291; 18 How. 497.

5. The court erred in overruling the demurrer to the complaint, p. 8.

6, 7, 8, 9, 10. The court erred in allowing the defendant-in-error to introduce testimony of the condition of the railroad at other places than that of the accident. He was allowed to prove by the witness, Hatcher, (p. 22,) that he had "noticed decayed timber within a mile of this place," meaning the locality of the accident, though he could say nothing "about this immediate place where the accident oc-"curred." Such testimony was calculated to withdraw the attention of the jury from the disputed question of the cause of the accident, and allowed the investigation of the soundness of the road at other places, when the question at issue was, was the road unsound where the run off occurred, and was the run off caused by such unsoundness?

11 and 12. The court erred, when, in speaking on the question of negligence in reference to the transportation of passengers it gave the instruction in these words: (p. 27).

"When treating upon this subject and discussing this "subject of transportation of passengers by the means of "steam, which is in its nature dangerous if not governed "properly and with great care, there is, perhaps, scarcely

"such a thing as slight negligence, because where the in-"terests are so great life is involved, and personal safety and "security is involved, and slight negligence under such cir-"cumstances, when there is such responsibility resting upon "the carrier, becomes indeed gross negligence in the eye of "the law."

This charge abolishes the well defined degrees of negligence and makes the want of the slightest care, incur the penalty of the grossest negligence. The recognized degrees of negligence range from the slight neglect of duty, to wilful misconduct, each degree carrying with it a correlative liability.

Sher. & Red. on Neg., § 600, *et seq.*

2 Red. on Rys., § 199, par. 9.

Where negligence occurs, not to the extent of being wilful or reckless, exemplary or punitive damages can not be awarded.

Ry. Co. v. Arms, 91 U. S. 489.

Otherwise where the negligence is wilful or reckless, gross.

The charge of the court was, in effect, that the plaintiff in error was guilty of gross negligence, and should have heavy damages assessed as a punishment, if guilty of negligence at all.

Such charge withdrew from the jury consideration of the different degrees of negligence, and looking to the amount of the verdict, it might properly be inferred that the jury did award the defendantinerror punitive damages.

Kansas Pac. R. R. Co. v. Peavy, 11 Am. & Eng. Ry. Cases, 260.

Williams v. Northern Pac. Ry. Co., 11 Am. & Eng. Ry. Cases 421.

13. The court erred in that part of the charge in these words (p. 34):

"So you see, gentlemen, you look to the future as well as "the past, if the evidence shows that his condition of health

"and business incapacity and his pain and suffering will "probably extend into the future as well as his injury from "the time of the accident until now."

The mere probability that the defendant in error would suffer from the injuries he received in the accident, was not sufficient to base a verdict for future damages upon. It should have been made to appear reasonably certain by the evidence that his injuries would continue in the future.

Secorde v. St. Paul, &c., R. R. Co., 18 Fed. Rep. 221.
Mackey v. Mo. Pac. Ry. Co., 18 Fed. Rep. 236.
Ward Co. v. N. O. City Ry. Co., 35 La. An. 202.
3d Suth. on Dam., 722.

14. The court erred in refusing to give the charge requested by the plaintiff in error, as follows, (p. 35):

"The care, skill and diligence required of carriers of pas- "sengers must be proportionate to the danger of their par- "ticular mode of conveyance, but they are not insurers "against all accidents, and the passengers take all the risks "incident to the mode of travel. This doctrine is not to be "construed as meaning that the carrier must adopt all the "precautions that an ingenious mind suggests or have all the "skill that science can give, nor that he must use all the pre- "cautions which after the accident has happened it can be "seen would have sufficed to avoid it; nor even must he use "such precautions as one would use who knew beforehand "that the accident would otherwise certainly occur."

This charge, as requested, embodied a correct legal proposition; the court refused to give it as asked, but gave it with the material modification of meaning, caused by the addition of the words, "omniscience is not required of railroad officers or employes." As given to the jury it conveyed the idea that all care, skill and diligence just short of that which might be exercised by minds omniscient, must be taken and used in the operation of railroads carrying passengers. This extreme degree of care would make the carrier liable for all accidents, except those designated as

the acts of God. In other words, would make them insurers of the safety of their passengers. The estimate a jury places upon such an utterance from the bench is great, and should be well guarded against.

Meier v. Penn. R. R. Co., 64 Pa. St. 225.

Jeffersonville R. R. Co. v. Hendricks, 26 Ind. 228.

Carroll v. Staten Island R. R. Co., 58 N. Y. 126.

15. The court erred in charging the jury as follows, (p. 35)):

"A common carrier is not liable for the safety of passen-"gers to the same extent that a common carrier is for the "safety of property. He does not insure the safety of passen-"gers, nor is he responsible for injuries suffered by them "from any cause other than his own, or against negligence "or willful wrong, but extraordinary diligence, care and pru-"dence is required, aided by the highest skill."

The vice of this charge lies in the latter clause: "but extraordinary diligence, care and prudence are required, *aided by the highest skill.*" The drift is all to the extreme verge of responsibility; the fairness of the first part of the charge being obscured or destroyed by the qualifying sentence at its close.

16. The court erred in refusing to charge the jury at the request of the plaintiff in error, as follows, (p. 36):

"The running off of the train is *prima facie* evidence of "negligence on the part of the officers or employes of the "road, and when this is shown and nothing more, the pre-"sumption is that the negligence of some person connected "with the road caused the accident. But this presumption "is a slight one and easily rebutted, as there are a consider-"able number of cases of run-offs in which there is no negli-"gence."

Lockwood v. Chicago & N. W. Ry. Co., 55 Wis. 50.

Tuttle v. Chicago, Rock Island & Pac. Ry. Co., 48 Ia. 236.

17. The court erred in refusing to give the following charge requested by the plaintiff in error (p. 36):

"While the compensation of the injured party will not be "confined to his pecuniary loss, but may embrace recompense "for the pain and suffering of both mind and body which "have resulted from the injury, and the jury may take into "consideration future as well as past physical pain and suf- "fering. But to justify them in doing so, it must be made "reasonably certain that such future pain and suffering are "inevitable, and if they be only probable or uncertain, they "cannot be taken into the estimate."

White v. Ry. Co., 18 Am. & Eng. Ry. Cases, 213.
Ry. Co. v. Strohm, 96 N. Y. 305.
Curtis v. Roch. & Syr. R. R. Co., 18 N. Y. 541.
Filer v. N. Y. C. R. R. Co., 49 N. Y. 45.
Clark v. Brown, 18 Wend. 229.
Lincoln v. Saratoga &c., R. R. Co. 23 Wend. 425, 435.
Aaron v. R. R. Co., 2 Daly, 127.
Hutchinson on Carriers, sec. 805, p. 621.
3 Sutherlin on Damages, pp. 261 and 722.
Memphis &c., R. R. Co. v. Whitfield, 44 Miss. 466.
Caldwell v. Murphy, 1 Duer. 233 (11 N. Y. 416).
Klein v. Jewett, 26 N. J., Eq. 474.
Matteson v. N. Y., &c., R. R. Co., 62 Barb. 364.
Fink v. Schroyer, 18 Ill. 416.
Black v. Carrollton R. R. Co., 10 La. Ann. 33.
Holyoke v. Grand Trunk R. R. Co., 48 N. H. 127.
Drew v. 6th Av. R. R. Co., 26 N. Y. 127.
S. & N. Ala. R. R. Co. v. Sullivan, 63 Ala. 266-273.
Fry v. Dubuque & So. W. Ry. Co., 45 Iowa, 416.
Spicer v. C. & N. W. R. R. Co., 29 Wis. 580.
Secorde v. St. Paul, &c., R. R. Co., 18 Fed. Rep. 221.
Mackey v. Mo. Pac. Ry. Co., 18 Fed. Rep. 236.
Ward Co. v. N. O. City Ry. Co., 35 La. An. 202.

18. The court erred in refusing to give the following charge requested by the plaintiff in error (p. 37):

"If there is no evidence before you as to the duration of "the plaintiff's life, then you cannot find damages for future

"loss that plaintiff may sustain in consequence of his in-"juries. You are not left to mere conjecture as to the prob-"able duration of the plaintiff's life ; there must be evidence "on this point in order to justify you in giving compensation "for future loss."

There was no evidence of the expectancy of life of the defendant in error, and the jury was left purely to speculation in giving future damages.

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122-649

FILED
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JAMES H. McKENNEY,
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THE CENTRAL RAILROAD AND BANKING CO., OF GEORGIA.

vs.

JAMES C. McKENZIE.

In the Supreme Court of the United States on Appeal from the Circuit Court of the United States for the Middle District of Alabama.

Brief of G. L. Comer, Attorney for Appellee.

THE CENTRAL RAILROAD AND BANKING CO. OF GEORGIA.

vs.

JAMES C. McKENZIE.

In the Supreme Court of the United States on Appeal from the Circuit Court of the United States for the Middle District of Alabama.

Brief of G L Comer, Attorney for Appellee.

It is admitted in this case that the appellant is a corporation under the laws of the State of Georgia, that the appellee is a resident citizen of the State of Alabama, and was such at the time this action was commenced and that the cause of action is transitory in its nature.

The appellant at the time, the injury occurred for which this action was brought, was doing business in said State of Alabama, and had agents to represent them in said State of Alabama. The Constitution and Laws of Alabama expressly authorize foreign corporations to carry on business within the limits of the State.

Constitution of Alabama, 1875 Article 14 paragraph 4.

The condition prescribed by said provisions of the Constitution to their doing business in Alaboma is, that such foreign corporations shall have "at least one known place of business and an authorized agent or agents therein, and such corporations may be sued in any county where it does business by service of process upon an agent anywhere in this State."

The acts of Alabama of February 15th 1879, "To prescribe the venue in suits against corporations (Acts of Alabama 1878-9 page 197 provides, "That on and after the passage of this Act, suits against any corporation, foreign or domestic, may be brought in any county in this State in which such corporation does business by agents."

The Constitution of Alabama also provides (Constitution 1875, Article 14. paragraph 12.) that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons."

The laws of Alabama (Code of Alabama 1876, sections 2934 and 2935), provide the manner in which, and the persons

upon whom, service shall be made in suits against corporations.

The provisions of these sections were strictly complied with in this case and under these provisions of the Constitution and Laws of the State of Alabama the Circuit Court of the United States for the Middle District of Alabama clearly had jurisdiction to try and decide this case

Dennick vs Railroad compony 103 U. S. 11 Railroad Co. vs. Harris. 12 Wal. 65. Ex-Parte Schollenberger, 96 U. S. 376. In this last case the Supreme Court on page 376 says, "The company objected to the jurisdiction of the court and insisted that it was neither an inhabitant of nor found within the district In ruling upon this objection, we held that, though the company was a foreign corporation it was suable in the district, because it had in effect consented to be sued there, in consideration of its being permitted by Congress, to exercise therein its corporate powers and privileges."

So in this case the Central Railroad in considerarion of its being permitted by the State of Alabama to exercise in said State its corporate powers and priveleges, in effect consented to submit to be sued in said State as provided by the Constitution and Laws thereof. Home Insurance Co. vs Penn Railroad Co. 11 Hun (New York) 182.

Bissell vs Mich Sou R R. Co. 22 N. Y. 258. Stallknecht vs. Penn R R. Co. 13 Hun (N Y.) 451. Hannibal and St. Joseph R. R. Co. vs. Crane 102 Ills. 249. In this last case the Supreme Court of Illinois rendered a lengthy opinion and reviewed all of the authorities.

The Circuit Court of the United States which tried this case had the inherent right to construe the provisions of the Constitution and Laws of Alabama applicable to this case. and in so construing said provisions decided that said court had jurisdiction to try and determine said case. Burgess vs. Seligman 107 U. S. 20.

I respectfully submit that under these authorities the Circuit Court did not err as set forth in the first, second, third and fourth assignments of error.

There was no error in over ruling the dumurrer to the complaint as stated in fifth assignment of error.

South and North Alabama R. R., Co. vs. McLendon 63 Alabama, 263 (see pages 273 and 274.)

The expenses of cure were incurred and whether the appellee had paid such expenses, or not he was liable in law for such expenses and had a clear right to recover whatever said expenses were reasonably worth. If said expenses had been paid by appellee he could not have recovered what he actually paid, unless he had shown by the testimony that the amount paid was reasonable.

The Circuit Court did not err in admitting the testimony of the witnesses Lancaster, John Moore, Hatcher, Taylor Moore and J. E. Smith, as to the condition of the track as is stated in the sixth, seventh, eighth, ninth and tenth assignments of error.

Vicksburg and Meridian R. R. Co. vs. Putnam 118 U. S. 545

The charge of the court as given and the refusal of the court to charge as stated in the eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth assignments of error contains no error of which the appellant can complain.

Hutchinson on carriers, pages 500, 1, 2, 3, 4, 5, 6, 7, 8, 9. 510, 11. 573, 799, 800, 804, 5, 6, 7, 8, 9, 810, 11, 12, 524, 25, 26, 529, 30, 31, 32.

Redfield on law of Railways 4th edition chapter 27, pages 201, 2, 216, 17, 18[illegible]g. 214, 15.

Sherman & Redfield on negligence Sec. 269.

Stokes vs. Soltenstall 13 Peters, 181.

Railroad Co. vs. Pollard 22 Wal. 341.

South & North Alabama R. R. vs. McLendon 63 Alabama 266.

"Taylor vs. Grand Trunk Railway Co. 48 N. H. 304.

Philadelphia & Reading Railroad vs. Darby 14, How. 486.

The Steamboat New World vs. King 16, How. 469.

New York Central Railroad Co. vs. Lock 17 Wal. 357.

Indianapolis & St. Louis R. R. Co. vs. Horst 93 U. S. 291.

Pennsylvania Company vs Roy. 102 U. S. 451

The charge of the Circuit Court in respect to the care to be used in operating Railroads was in the exact language of the Supreme Court of the United States used in this case last cited.

The court charged the law correctly and the instructions given were amply sufficient to present the whole controversy to the jury plainly, and there was no error in refusing the requests to charge as asked by the appellant although said requests to charge may have been correct.

The School vs. Risley, 10 Wal. 91

Railway Company vs. Whitton, 13 Wal. 290.

Kelley vs Jackson, 6 Peters, 622.

Clymer vs. Dawkins, 3 How. 674.

Indianapolis R. R. vs. Horst, 93. U. S. 291.

Laber vs. Cooper, 7 Wal. 565.

Railway Company vs. McCarty, 96 U. S. 258.

Evanston vs. Gunn, 99 U. S. 660.

J. L. Bonner

Atty for appellee